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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 653

FARBENFABRIKEN BAYER A.G., *Petitioner*

v.

STERLING DRUG, INC., *Respondent*
(Antitrust case)

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 17, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent's brief in opposition to the petition helps to crystallize the important issues presented by this case.

1. Conflict With *Timken*

Respondent contends that the only illegal aspect of the 1923 agreements was the fact that they divided world markets (R. Br. 23-25). It claims that the use or allocation of trademarks to effectuate that purpose was not illegal. In this it relies on this Court's decision in *Timken Roller Bearing Co.* v. *United States*, 341

U.S. 592. This, however, is not the way petitioner understands *Timken* which states that "a trademark cannot be used illegally as a device for Sherman Act violations." *Id.* at 599. In any event, it is an important question for this Court to decide, whether such use of trademarks is consistent with the antitrust laws. If it is, then world markets may freely be divided by the use of trademark registrations.

2. Conflict With *Orenstein-Koppel*

Respondent does not dispute that the decision in *Koppel Industrial Car & Equipment Co.* v. *Orenstein & Koppel Aktiengesellschaft et al.*, 25 F. 2d 716 (2d Cir. 1928) permitting the German Orenstein-Koppel company to compete with its former American subsidiary under the Orenstein-Koppel name was based on antitrust considerations. Nor has it even attempted to show why the same antitrust considerations should not have been controlling here. It merely states the obvious and undisputed fact that the *Orenstein-Koppel* case was an unfair competition case and not an antitrust case. The conflict between these cases plainly requires resolution by this Court.

3. Denial of Relief Contrary to Antitrust Policy Expressed in *Timken* and *Orenstein-Koppel* and as Implemented by the Department of Justice

Petitioner in this case is asking for relief almost identical to that which was incorporated by the Government in the amended Consent Decree entered in *American Bosch Corporation*, Civil Action 20-164 (S.D.N.Y. 1942). (See Petition, p. 26)

The Department of Justice obviously would not include such a provision in order to give German Bosch

a free ride on the good will of American Bosch, as respondent claims petitioner seeks here (R. Br. 12) but only to lift a barrier to competition and to implement the same antitrust policies expressed by this Court in *Timken* and by the Second Circuit in *Orenstein-Koppel*. The relief sought by petitioner would, of course, be subject to the same safeguards against confusion between the products of German Bayer and New York Bayer as the Government thought proper to include in the *Bosch* decree.

Respondent does not attempt to dispute the parallel nature of this case and the *Bosch* case. It simply contends that relief of this kind has never been granted in a private antitrust case. If that is so, then this is a good reason why it is important for this Court to review this case. The reason such relief is granted in a Government case is to restore competition. It is the same policy which is implemented when similar relief is granted to a private party.

4. Denial of Due Process

Respondent, by its silence, concedes that the action of the Third Circuit in basing its decision on purported agreements whose execution and performance had been conceded by petitioner only for purposes of its own motion for summary judgment violated the due process requirements laid down by this Court in *Fountain* v. *Filson*, 336 U.S. 681 and is in direct conflict with the decision of the Sixth Circuit in *Regnaud* v. *White*, 170 F. 2d 323. Respondent does not dispute that the petitioner in the District Court clearly limited its concession with respect to these purported agreements in its motion for summary judgment. Respondent merely contends that petitioner did not continually

raise this point in the Court of Appeals but that it did so only on one occasion. Petitioner in its Reply Brief wherein it discusses these purported agreements plainly states at p. 10, Fn. 3:

> "Although there is no proof that these agreements were ever executed plaintiff *for purposes of its motion for summary judgment,* assumes that these were executed."

This violation of due process is such departure from the "accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision". Rule 19(b) of the Rules of this Court.

CONCLUSION

This case presents important issues. The decision below is in conflict with the decisions of this Court and that of another circuit. It should be reviewed by this Court.

Respectfully submitted,

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